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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

LANCE E. RUCK - Petitioner

v.

ROBERT W. EARLEY - Respondent

and

UNITED TRANSPORATATION UNION

Executive Board, et al. - Respondents

On Petition for Writ of Certiorari To The Court Of Appeals For the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTION PRESENTED FOR REVIEW

1. Whether a pro se Defendent is entitled to a Jury Trial consistent with the Seventh Amendment of the Constitution of the United States of America?

SUBSIDIARY QUESTIONS PRESENTED FOR REVIEW

Consistent with Rule 14. 1. (a): " . . . The questions shall be set out on the first page following the cover, and no other information may appear on that page. The Statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.", Petitioner submits those subsidiary questions which are fairly included within the "question", to wit:

Subsidiary Questions for Review

1a. Whether a district court judge, at the pre-trial hearing, unable to fashion a "settlement", may replace the Jury Trial with a permanent injunction hearing?

1b. Whether a district court judge, at the permanent injunction hearing, may decline to take testimony concerning alleged violation of the Federal Wiretap Act, from the Defendant who allegedly "intercepted" oral communications, or from the Plaintiff who claims his rights under the Act were violated, both being present in the hearing?

1c. Whether a district court judge may enter a permanent injunction which is not based upon fact, reason, or law?

1d. Whether a district court judge may dismiss an action without the defendants knowledge or permission based upon a "Settlement Agreement and Release" over which the district court retains jurisdiction with authority to enforce?

SUBSIDIARY QUESTIONS - Continued

1e. Whether a district court judge may ignore an intervenor's status, given by a previous judge, and settle a matter without any input from the intervenor pursuant to a "Settlement Agreement and Release", which acknowledges that "Intervenor is not part of the settlement"?

1f. Whether the court of appeals may dismiss an appeal as moot by citing a case which is in direct conflict with fact, reason, and law?

1g. Whether the court of appeals may ignore their own precedent, Supreme Court precedent, and common sense in order to protect a minor "misbehaving" government agency?

LIST OF PARTIES

PETITIONER:

LANCE E. RUCK

RESPONDENTS:

ROBERT W. EARLEY

UNITED TRANSPORTATION UNION,
Excutive Board, et al.

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No. _____

The
Supreme Court of the United States
October Term, 1997

ROBERT W. EARLEY

Plaintiff - Appellee - Respondent

v.

UNITED TRANSPORTATION UNION, Executive Board, et al

Defendants - Respondents

LANCE E. RUCK

Intervenor/Defendant - Appellant

Petitioner

On Petition for Writ of Certiorari To The Court Of Appeals For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Lance E. Ruck, Pro Se, Petitioner in this

cause, and files his Petition for Writ of Certiorari, requesting that the Supreme Court reverse the judgments of the United States District Court for the Northern District of Ohio, Eastern Division below in favor of Respondents and remand this cause for a trial on Plaintiff's, Petitioner's, and Defendant's (UTU Executive Board Members and UTU member Kenneth R. Smoot) request for a jury trial under applicable statutes.

As grounds for such relief, Petitioner would respectfully show as follows:

OPINIONS BELOW

The Memorandum Opinion and Order of the United States District Court for the Northern District of Ohio, Eastern Division, dated October 29, 1996 is attached to this petition as Appendix A.

The Judgment of January 31, 1997, upon the motion of the plaintiff for an order of voluntary dismissal of the within action, conditioned on the Court's jurisdiction to give effect to or to enforce the Settlement Agreement entered into by the plaintiff and defendants, is attached to this petition as Appendix B.

The Order of February 5, 1997, upon the motion of the plaintiff for an order dismissing the within action without prejudice to plaintiff's right to refile the action and vacating the permanent injunction, is attached to this petition as Appendix C.

The "Settlement Agreement and Release", done without the knowledge of Intervenor/Defendant - Appellant Ruck, Defendant Smoot, and already concluded before the UTU Executive Board member defendants ever received copy of same is attached in the Table of Appendices to this petition as Appendix E.

The Order of the United States Court of Appeals for the Sixth Circuit of September 24, 1997denying both the motion to dismiss and the motion to stay is attached to this petition in the Table as Appendix F.

Both parties filed motions to reconsider and the Order of the United States Court of Appeals for the Sixth Circuit dismissing

Petitioner's Appeal as moot is attached to this petition as Appendix D. The original Notice of Appeal is herein attached as Appendix G, also in the Table.

Petitioner herein filed a Suggestion for Rehearing En Banc with accompanying Motion for Extension of Time. Said extension was denied, the Suggestion rejected, and I was notifified the Certified Record was never provided by the District Court. The communications concerning this matter and the Suggestion for Rehearing in Banc is attached as Appendix H. Only Appendices A through D appear in the Petition for Writ of Certiorari (Table of Appendices was bound in Rule 33.2 format with a Motion for Leave of the Court).

This petition for writ of certiorari is filed because the above actions and opinions have denied defendants a proper determination by a trier of fact on the merits of interception, use, and disclosure allegations under the Federal Wiretap Act as well as denying petitioner a jury trial on his counterclaims. Such determinations are inconsistent with fact, reason, law, the First and Seventh Amendment of the United States Constitution.

JURISDICTION

The United States District Court for the Northern District of Ohio, Eastern Division had original jurisdiction pursuant to 18 U.S.C. § 2510 et seq., 29 U.S.C. § 401 et seq., and 28 U.S.C. § 1331. Said court replaced the jury trial with a permanent injunction hearing, issued permanent injunction, and then vacated the injunction and dismissed the plaintiffs actions without the permission or knowledge of the defendants.

The United States Court of Appeals for the Sixth Circuit had general subject matter jurisdiction pursuant to 28 U.S.C. § 1291 as well as specific subject matter jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). Said court dismissed the case as moot upon reconsideration, citing a case where those enjoined actually received a jury trial before the appeal was dismissed as moot.

This petition for writ of certiorari is filed within 90 days after the dismissal of the appeal as moot (December 3, 1997) by the Court of Appeals for the Sixth Circuit. The Supreme Court's jurisdiction is founded on 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Omnibus Crime Control and Safe Streets Act of 1968 (as modified by the Electronic Communications Privacy Act of 1986), Title III, commonly referred to as the Federal Wiretap Act (18 U.S.C. § 2510 et seq.) provides:

> § 2510. Definitions "(2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;"

§ 2511 is entitled "Interception and disclosure of wire, oral, or electronic communications prohibited" and the complete law is attached to the petition as Appendix I.

The Labor-Management Reporting and Disclosure Act (29 U.S.C. § 401 et seq.) states in Congressional declaration of findings, purposes, and policy at § 401(b) the following:

> "The Congress further finds, from recent investigations in the labor and management fields, that there has been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives."

And § 411 (a)(5) provides:

"No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

The appropriate portions of § 401 et seq. are also attached to Appendix I.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Seventh Amendment

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Petitioner advised the Court of Appeals for the Sixth Circuit of these Constitutional questions pursuant to FRAP R 44, said filing is Appendix J.

STATEMENT OF THE CASE

1. **The Parties**

The parties, and other principal persons and entities in this case, are:

Lance E. Ruck - Petitioner in this case, a new party defendant in case 1:94CV674, and an intervenor in case 1:94CV597. Mr. Ruck is a 24 year BNSF railroad employee and member of the United Transportation Union (hereafter "UTU") pursuant to federal labor law. He resides in El Paso, Texas, with his wife and two daughters.

Kenneth R. Smoot - Original defendant in case 1:94CV674. Mr. Smoot is a 20 year CSXT employee and UTU member. Mr. Smoot is the plaintiff in a companion case, 1:94CV485, wherein the same judge recently granted summary judgment for defendants UTU and CSXT, pending for over three years. Mr. Smoot is temporarily residing in Virginia with his wife and two children.

Robert W. Earley - Respondent in this case, plaintiff in case 1:94CV674, and plaintiff in case 1:94CV597. Robert W. Earley is an elected International Vice President of the UTU. Mr. Earley is a CSXT employee, currently in exempt status, who resides with his family in the Cleveland, Ohio area. He is a member of the UTU.

Clinton J. Miller, III - Respondent in this case on behalf of the UTU Executive Board (hereafter "ExBd") members. Mr. Miller is the UTU General Counsel, who has been the counsel of record for the UTU "ExBd" members (past and present), defendants in case 1:94CV597. Mr. Miller is also signatory to the "Settlement Agreement and Release" and he resides in the Cleveland, Ohio area with his family.

UTU Executive Board - The UTU Executive Board is a five member board pursuant to Article 2 of UTU Constitution whose duties and responsibilities are stated in Articles 24, 25, and 26 of said constitution. The board's primary function is to hear charges against international officers. Past

Executive Board members included: Chairman K. N. Thompson, J. A. Huston, S. N. Kramer, and J. L. Arnold. Current Executive Board members include Chairman J. A. Huston, J. J. Risch, J. W. Armstrong, M. F. Tello, D. L. Harden, and alternate member T. R. Shelby. All past and present members of the executive board are members of the UTU and they reside throughout the United States.

G. Thomas DuBose - The past UTU President in office when Mr. Earley first brought his litigation. President DuBose stated publicly that Mr. Earley was suing his union and refused all settlement offers. Mr. DuBose currently resides in Louisiana with his wife.

Charles L. Little - The current UTU Predident who authorized the "Settlement Agreement and Release" Mr. Little lives in the Cleveland, Ohio area with his wife.

2. **Brief Factual History of Case**

UTU member Kenneth R. Smoot filed claim for 30 shares of CSXT stock (value $2300) pursuant to CSX-T Labor Agreement T-140(d)-89. His General Chairman, V. V. Elswick, declined to progress his claim and member Smoot progressed his grievance to the Board of Appeals.

Said five member Board, including Petitioner herein, unanimously sustained Smoot's appeal on February 19, 1993. Said decisions of the Board of Appeals are substantial decisions, have withstood all court challenges, are final and binding upon the union, and become the official position of the union (See App. K).

Elswick progressed the claim to a standing Special Board of Adjustment, supplying a submission under his signature which stated member Smoot was entitled to the stock, and requested UTU Vice President Earley be the partisan Employee Member of the Public Law Board. The panel also included partisan Carrier Member Howard

Emerick, from CSXT Labor Relations, and National Mediation Board Neutral Arbitrator H. Raymond Cluster. The hearing was held in Baltimore, Maryland at CSXT's offices on or about May 6 or 7, 1993.

Claimant Smoot attended the hearing and recorded it. Immediately after the hearing began, Mr. Emerick asked for an Executive Session, and all parties, except the panel, were removed from the room. Smoot's recorder continued to run and the styled "Executive Session" was caught on tape. A denying award, dated July 15, 1993, but signed August 30, 1993 was issued denying Smoot's claim and is Appendix L.

Smoot's local, UTU local 662, paid to have the recording transcribed in which Mr. Earley argued against Smoot's claim and agreed with the Carrier's position. Local 662 officers, under lodge seal dated September 3, 1993, sought investigation of the very serious matter and later sent a copy of the transcript as well as a copy of the tape recording of the Executive Session only,with copies of the transcript to Mr. Earley, Mr. Elswick, all Local Chairman, and all Local Presidents under the jurisdiction of General Committee. Earley responded to President DuBose in a letter of October 14, 1993, stating that he took minor exception to the accuracy of the transcript (2 exceptions noted) but could find no impropriety in his actions. His letter was also copied to all local officers, Mr. Elswick, and Mr. Smoot and he provided a copy of the transcript to an Alternate Vice President of UTU.

On December 15, 1993, Mr. Smoot filed formal charges against Elswick under Article 74 of the UTU Constitution and separate formal charges against Vice President Earley pursuant to Article 25 of the UTU Constitution. In both sets of charges, Smoot included quotes from the transcribed tape and included the transcript itself as one of many exhibits to each set of charges. A trial of

failed by one vote but Elswick was defeated in the next election in early 1995.

On the other hand, the Executive Board (comprised of Thompson, Huston, Kramer, and Arnold), met in St. Louis to review all evidence, including the transcript of the tape, and determined there was sufficient evidence to proceed with a trial. After initial legal proceeding which mooted Smoot's charges, Petitioner herein, refiled Article 25 charges based solely upon the language of the PLB Award and UTU Constitution.

3. **Procedural History of this Case**

Petitioner initially notes the procedural history of this case is extensive, tortuous, and contains significant abuse of process. It primarily involves the combined cases of 1:94CV0597 and 1:94CV0674 which themselves have over 300 docket entries to date. Ancillary to the combined cases is a companion case, Smoot v. UTU, et al. (1:94CV0485). As all information is in the Certified Dockets available to the Honorable Court, petitioner will briefly discuss the most important actions which have occurred to date resulting in this Petition. Smoot v. UTU, et al. (CSXT) was filed March 7, 1994 in Cleveland, by attorney Gregory Hughes, docketed as 1:94CV0485, which sought redress under 29 U.S.C. § 185 et seq. (Duty of fair representation) and 45 U.S.C § 153 First to overturn a fraudulent Public Law Board. Said filing attached as Exhibit 1 a transcript of the Executive Session of PLB 3882, Case No. 155.

Respondent Earley filed an Original Complaint and Motion for TRO against Smoot on March 14, 1994 in the U.S. District Court of Maryland (S 94-622) alleging violation of State and Federal Wiretap Law. A hearing held March 22, 1994 issued TRO and what remained of the case was transferred to Ohio.

Respondent Earley filed Earley v. UTU Executive Board, et al. on March 22, 1994 in Cleveland, Ohio seeking TRO to prevent the

"ExBd" trial set for March 23, 1994 on Smoot's charges. Agreement between UTU General Counsel Miller, Earley's attorney, and Judge Wells in the Judge's chambers the morning of the trial resulted in it being "opened and closed". Smoot did not attend per the Maryland TRO and his representative was denied a postponement to amend the charges and withdrew Smoot's charges per Thompson of the "ExBd". No judicial hearing was ever held to determine if Smoot had the right to bring his charges.

Petitioner filed new charges and a new trial date was set for April 19, 1994. On April 14, 1994, Miller entered into the De Facto TRO (his own terminology) which postponed the "ExBd" trial indefinitely (See Appendix M). On April 15, 1994 Earley added petitioner as a New Party Defendant in an Amended Complaint (filed without leave and out of time) and again filed against the UTU "ExBd". Earley then changed counsel and filed a supplemental complaint, renewed motion for preliminary injunction, and motion for consolidation of cases 597 and 674.

Petitioner then filed his Motion to Intervene in Case No. 1:94CV0597 on April 28, 1994, now aware that Miller had a serious conflict of interest and had no desire for the "ExBd" to try Earley relative to his actions at PLB 3882. A TRO hearing was held February 28, 1995, said hearing transcript a part of the Certified Record. A TRO was granted on March 16, 1995 and a status conference was held July 31, 1995 wherein Petitioner's Motion to Intervene was granted along with disposition of numerous other rulings. Prior to the conference on July 31, 1995, the case was again reassigned to Judge Peter C. Economus, the fourth judge to have the cases (Wells, White, Oliver, and Economus). In the interim, numerous motions and cross motions were filed and discovery continued including depositions from "ExBd" members, Earley, and Ruck. It is noted defendant Smoot was never deposed nor was he present at the

Oliver PI hearing, albeit he did take part in the Oliver status conference held 7/31/95.

A trial order was issued on January 22, 1996 setting the trial for May 28, 1996 and pre-trial for May 15, 1996. Summary judgment motions and cross motions were filed and denied. The requirements of the trial order were met by the parties and pre-trial was conducted on May 15, 1996. On May 16, 1996, an Order canceled the jury trial requested by the parties and replaced it with a permanent injunction hearing set for May 28, 1996. Defendant's Ruck and Smoot, per court instruction, filed motions in opposition to a permanent injunction citing fact, reason, and law why plaintiff was not entitled to relief. The hearing was held on May 28, 1996 wherein no testimony was taken from Earley or Smoot.

On October 29, 1996 permanent injunction was issued prohibiting an internal trial of Earley and finding all defendants' violated §2511 of Title III. Petitioner filed his appeal November 26, 1996 (App. "G") and his statement pursuant to FRAP R 10(b) on December 19, 1996. Notification of the Briefing Schedule was dated January 9, 1997 and appellant filed a motion for relief pursuant to FRAP R 27(a) and 30(f) which was summarily denied.

On January 24, 1997, appellee filed a motion for dismissal with reservation of jurisdiction together with a proposed judgment entry. Said motion was received by appellant on January 31, 1997, the same day judgment was entered, the same day appellee filed his motion to dismiss 1:94cv674, and the same day appellant forwarded his briefs with Appendices which are a matter of record.

An Order was issued on February 5, 1997 dismissing 1:94cv674 without prejudice to plaintiff's right to refile the action and vacating the permanent injunction. Appellant timely filed opposition to the Judgment (1/31/97) and Order (2/5/97) which were received and time stamped after the rulings had issued.

Appellant filed a motion to stay the actions with the District Court on February 3, 1997. Respondent filed motion to Dismiss Appeal for Lack of Jurisdiction on February 13, 1997 and Petitioner filed Opposition to said motion which is herein attached as Appendix N. Respondent then filed Motion for Reconsideration of the Court's Decision Entered September 24, 1997. Appellant filed a motion to reconsider the motion for stay and also filed opposition to reconsideration of the court's decision which is attached as Appendix O. Those filings resulted in the dismissal of the appeal as moot (App. "D").

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A. THE DISTRICT COURT ERRED WHEN IT REPLACED THE JURY TRIAL WITH A PERMANENT INJUNCTION HEARING.

The District Court Judge erred when, unable to fashion a "settlement" at the pre-trial hearing, he canceled the Jury Trial requested by the parties and replaced it with a permanent injunction hearing. All pre-trial order requirements had been met by the parties, i.e,. Narratives, Joint Statement of Contested and Uncontested Facts, Witnesses, Motions in Limine, etc.

The problem was that General Counsel Miller, per the wishes of President Little, wanted to pay Earley "whatever it costs" for Earley's expenses and legal fees to dismiss his actions with prejudice

in exchange for no internal trial. While the judge explained that plaintiff's willingness to dismiss with prejudice was an admission there was no violation of the §2511, Petitioner, advised that we already knew that as the evidence was never prohibited by §2515. When the judge was unable to get defendant Smoot to agree to settlement, he stated to Ruck that "I can just rule against you, but you'd appeal that wouldn't you"? Petitioner herein was silent. Plaintiff's actions should have been dismissed as a matter of law. Please note Black's Law Dictionary (5th Ed.) definition of trier of fact:

> "Term includes (a) the jury and (b) the court when the court is trying an issue of fact other than one relating to the admissibility of evidence. Calif.Evid.Code. Commonly refers to judge in jury waived trial or jury which, in either case, has the exclusive obligation to make findings of fact in contrast to rulings of law which must be made by judge."

Also noted is Federal Civil Judicial Procedure and Rules, Rule 38(a), to wit:

> "**(a) Right Preserved**. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

B. THE DISTRICT COURT ERRED WHEN IT DECLINED TO TAKE TESTIMONY CONCERNING THE CIRCUMSTANCES OF THE INTERCEPTION FROM DEFENDANT SMOOT AND PLAINTIFF EARLEY WHEN BOTH WERE AVAILABLE AT THE PERMANENT INJUNCTION HEARING.

In conference with all parties before the permanent injunction hearing, I pointed out to the Judge that the plaintiff has not allowed discovery in good faith throughout this proceeding and I desired to call

Smoot and Earley in order to get necessary testimony concerning the wiretap act. The Judge responded that he did not need testimony concerning the Act.

Therefore, the District Court conducted no valid inquiry in its Permanent Injunction hearing of alleged interceptor Smoot nor of Earley even though it had adequate opportunity to do so. By the time the court convened its discretionary PI hearing in place of the trial by jury that defendants were entitled to pursuant to FRCVP R 65(a)(2) and applicable law (Ferroni v. Ferroni, 862 F.2d 109 (6th Cir. 1988), Flynn v. Flynn, 560 F.Supp 922, 925 (N.D.Ohio 1983) ("Under section 2511 "the determination of the existence of the element of willfulness is a matter for the trier of fact"); *see also Asmar v. Detroit News, Inc.*, 836 F.2d 1347 (6th Cir.1988) (unpublished opinion) (under section 2511 "willfulness is a question for the jury"), the court was well aware of defendant's (in 1:94CV0674) numerous filings alleging the original tapes contained probative evidence going to the heart of the willfulness issue, now modified to intent by the Electronic Communications Privacy Act of 1986, and based upon legal precedent set in Thompson v. Dulaney, 970 F.2d 744 (10th Cir. 1992) ("In *United States v. Townsend*, 987 F.2d 927 (2d Cir.1993), the Second Circuit set forth a suggested jury instruction on the intent element of Title III. The Court stated that the defendant must be shown to have acted "deliberately and purposefully; that is defendant's act must have been the product of defendant's conscious objective *rather than the product of a mistake or an accident." Id.* at 930. (emphasis added)"). Clearly, evidence was available to allow the intent issue to be addressed upon actual merits and law.

C. THE DISTRICT COURT ERRED WHEN IT GRANTED PERMANENT INJUNCTION CONTRARY TO FACT, REASON, AND LAW.

"The standard for entry of permanent injunction is essentially the

same for preliminary injunction, except that moving party must show actual success on merits rather than a likelihood of success"(*Del Pino v AT&T Information Systems, Inc.* 921 F.Supp 761 (S.D.Fla. 1996). Unlike the Oliver Hearing, wherein it was already determined that the four "ExBd" members had read a copy of the transcript, the undisputed sworn testimony from the PI hearing determined Huston would recuse himself and Armstrong, Risch, Harden, and Tello had not read the transcript or heard the tape. Yet the Permanent Injunction determined at page 7 of Appendix A that all defendants violated §2511. Indeed, I specifically asked questions to Mr. Armstrong (page 26) and Mr. Risch (page 36-37) intended to prove, by relevant law, that they could not be considered guilty of a use and disclosure violation of Title III, the final questions and answers to Mr. Risch as follows:

"Q. What I am asking you, Mr. Risch, based on that do you know any of the circumstances of an alleged interception, how it happened?

A. I have heard, just generally, there was some tape that I should avoid at all costs, being I'm on the Executive Board. And I honest avoided having anything to do or getting anywhere near it since I've been a member or an alternate to the Executive Board, or a member of the Executive Board.

Q. That is hearsay information. What I want to know - -

THE COURT: Sustained.

BY MR. RUCK:

Q. What I want to know —

THE COURT: Please, Mr. Ruck, if you have a question, ask it.

MR. RUCK: I have asked it, your Honor, and as one of the premises in the legal cases which determines whether there is to be use and

> disclosure, I just wanted to see whether there is actual knowledge.
> THE COURT: I understand. I will determine what evidence is admissible and what is hearsay and what is not hearsay. I am giving you some leeway because you are not a lawyer —
> MR. RUCK: I understand. I have no further questions."

The Court said it understood and I assumed the Court did understand the ramifications of *Willams v. Poulos*,
11 F.3d, 271, 284, (1st Cir. 1993) ("(9) It is settled that a person has not committed a disclosure or use violation under Title III unless s/he "knew or had reason to know that the interception (by which the information which was disclosed or used had been obtained) itself was in violation of Title III." *United States v. Wuliger*, 981 F.2d 1497, 1501 (6th Cir.1992); *See also Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir.1992). In other words, "knowledge or reason to know of the illegality is an element of the offense." *Wuliger*, 981 F.2d at 1501. Thus, in a civil action, a plaintiff must demonstrate "1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of Title III." *Thompson*, 970 F.2d at 749; *See also Cheek v. United States*, 498 U.S. 192, 199-200, 111 S.Ct. 604, 609-610, 112 L.Ed.2d 617 (1991) (making clear that the common law presumption that every person knows the law ordinarily applies when courts construe criminal statutes)."

The above standard and related cases implicitly exonerates all "ExBd" members as they had no actual knowledge of the alleged unlawful interception which is the subject of the injunction which

currently forbids them from conducting an internal trial.This, even if there were an illegal interception, and of course there was none. See also Williams v. Poulos, 11 F.3d 271, 286 (1st Cir. 1993) ("Moreover, we think that Congress, in enacting § 2515, *see supra* note 32, made clear its endorsement of disclosures and/or uses of illegally intercepted material for the adjudicatory purposes contemplated by the district court. As noted, § 2515 bans the introduction into evidence of both illegally intercepted material and any evidence derived therefrom. Implicit in this ban, we believe, are two assumptions: (1) that the intercepted material will be presented to a court or jury for an initial adjudication of whether it was acquired illegally; and (2) that a court will thereafter determine whether other evidence was derived from the intercepted evidence. Simply put, we are at a loss to see how these functions could be performed without the types of adjudicatory "disclosures" and/or "uses" that plaintiffs view as banned by Title III."). To date, there has been no determination by a Court or Jury whether there has even been an interception which was acquired illegally, from which use and disclosure violations could flow.

Indeed, there are also public interest issues at stake here addressed in both the First and Fourth Amendments, which were incorrectly decided based upon fact, reason, and law. Specifically, Kratz v. Kratz, 477 F.Supp 463 (1979) would require an expectation of privacy under circumstances justifying such expectation ("The statute draws a significant distinction between "wire " and "oral" communication in that it defines "oral communications: as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). The definition of "wire" communication contains no such phrase requiring the communication to have been made under circumstances justifying an

expectation of privacy. Thus, a telephone call, which is a wire communication within this definition, "is protected by Title III regardless of whether the participants actually have any justifiable expectations of privacy.") In the instant case, Plaintiff would then be required to prove that he had an expectation of privacy from his employer and his client in order to argue against both (a violation of §401 (b)). See Goodall's Charter Bus Serv. v. San Diego, Etc. App., 178 Cal.Rptr. 21 ("To maintain a cause of action under the statute, the plaintiff's subjective expectation of privacy in his oral communication is not sufficient; the expectation must be reasonable (*United States v. Hall* (9th Cir. 1973) 488 F.2d 193, 196)."

Assuming Plaintiff could survive a reasonable expectation of privacy, he would be required to show that his oral conversation was one within the meaning of the Act, i.e., a private conversation. Not private in that it was protected from other ears who were not a party, but private within the Congressional intent of the Omnibus Crime Control and Safe Streets Act of 1968, Title III, wherein "every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage." See Fultz v. Gilliam, 942 F.2d 396 (6th Cir. 1991) ("The right of privacy, recognized at common law in a large majority of American jurisdictions, reflects an individual's "right to be let alone." RESTATEMENT (SECOND) OF TORTS § 652A comment a. As generally interpreted, it encompasses, *inter alia*, an individual's entitlement to be free from unreasonable intrusions upon his seclusion and unreasonable publicity concerning his private life. *Id* § 652A. The prohibitions Congress incorporated into section 2511(1) of Title III protect both of these interests first, by prohibiting the surreptitious interception of private communications in the first instance -- a highly offensive physical intrusion on the victim's private affairs, *see id.* §

652B and comment b. – and second, by circumscribing the dissemination of private information so obtained.5").

> Footnote 5: "The difference in formulations between the common law right to be free from publicity about one's private life and the statutory prohibition on disclosure and use of illegally intercepted communications further illuminates the broad scope Congress intended for the Wiretapping Act. According to the Restatement: One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a)would be highly offensive to a reaso nable person, and (b) is not of legitimate concern to the public.
> RESTATEMENT (SECOND) OF TORTS § 652D."

Common sense tells this Petitioner that public knowledge of union misrepresentation is not offensive and must be a legitimate concern of the public, especially since the Congress found it necessary to specifically address it in 29 § 401(a), (b), and (c). The actual facts are in the tape and transcript. Above is quoted the law.

Petitioner simply does not believe a proper adjudicatory review of the transcript of the executive session of PLB 3882 (Appendix P) can confirm a violation of §2511 in light of current law.

D. THE DISTRICT COURT ERRED WHEN IT DISMISSED THE ACTIONS WITHOUT THE DEFENDANTS' KNOWLEDGE OR PERMISSION BASED UPON A "SETTLEMENT AGREEMENT AND RELEASE" OVER WHICH THE DISTRICT COURT RETAINS JURISDICTION AND

ENFORCEMENT.

The Federal Civil Judicial Procedure and Rules, Rule 41(a)(2), states unambiguously:

> "**(2) By Order of Court.** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. **If a counterclaim has been pleaded** by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, **the action shall not be dismissed against the defendant's objection** unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." **(emphasis mine)**

Certified Docket 1:94CV674, Earley v. Smoot et al. (Ruck), Item 9 dated 4/28/94 - -ANSWER to Amended Complaint by defendant Lance E Ruck (11pgs+exh) (rs) [Entry date 04/29/94] [1:94cv674] - states in pertinent part at pages 9 and 10: "WHEREFORE PREMISES CONSIDERED, New Party Defendant respectfully requests that this action be dismissed, that I be granted my costs and Pro Se attorney's fees and such other and different relief as may be appropriate in the premises." It is Petitioner's layman opinion that the above referenced quote qualifies as a counterclaim pursuant to the Rules of Civil Procedure.

E. THE DISTRICT COURT ERRED WHEN IT IGNORED THE INTERVENOR STATUS OF PETITIONER AND MADE "SETTLEMENT" WITHOUT HIS KNOWLEDGE OR PARTICIPATION.

"When intervention has been granted, intervener becomes a "party", within this rule, entitled to litigate fully on merits" (*Hartley*

Pen Co. V. Lindy Pen Co., D.C.Cal.1954, 16 F.R.D. 141.). "This court has interpreted Rule 24(a) as establishing four elements, each of which must be satisfied before intervention as of right will be granted: (1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court. *Cuyahogo Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir. 1993). We review a district court's determination as to timeliness for an abuse of discretion, and the remaining three elements are examined de novo. *Id.* (*Michigan State AFL-CIO v. Miller*, Nos. 95-1397/1858, ELECTRONIC CITATION: 1997 FED App. 0002P(6th Cir.).

Petitioner filed his Motion to Intervene on April 28, 1994 (#17 of the Certified Record of "597") with Proposed Findings of Fact and Conclusions of Law (#18) with appropriate blank Order. Plaintiff, by and through his counsel, filed a response on May 12, 1994 (#34) denying defendant Ruck had met the requirements of the law. Petitioner filed a reply with exhibits on May 23, 1994 (#39) addressing these issues. Some 15 months after his original motion, after some 100 additional docket entries, after additional discovery including depositions, after two preliminary injunctions, after a status conference, and after a court hearing, the Honorable Solomon Oliver, Jr. granted petitioner's Motion to Intervene.

In placing this matter in perspective relative to "E": 1) Petitioner, in Argument (p. 7, # 17), stated: "Specifically, Movant wishes to avoid further proceedings behind closed doors which neuter or moot the charging party without his knowledge or permission and without adequate ability to make his case to the Honorable Court." 2) "Settlement" in pre-trial rejected, jury trial replaced, permanent injunction entered, and appeals made. 3) Settlement Agreement and

Release completed January 16, 1997 which acknowledged "Intervenor not part of the settlement". 4) Executive Board members notified on January 20, 1997. 5) Miller gave Defendants' Notice of Consent for Dismissal with Reservation which is filed on January 24, 1997 by Plaintiff's counsel and mailed by Miller to intervenor Ruck and Plaintiff's counsel the same day. 6) Ruck timely responds to these actions for naught as they have been accepted by the district court already.

Petitioner, and the Honorable Justices, now have the benefit of the Public Record as well as hindsight; Ruck's rights under the UTU and U.S. Constitution have been decided behind closed doors without his knowledge or permission, thus denying him his right to make his case to a court of competent jurisdiction!

F. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED WHEN THEY DISMISSED CASE NO. 96-4295 BASED UPON *BARRISTER ASSOCS. V. UNITED STATES (IN RE TAX REFUND LITIG.)*, 915 F. 2D 58. 59 (2D CIR. 1990).

Petitioner takes exception to the citation of *Barrister Assocs. v. United States (In re Tax Refund Litig.)*, 915 F2.d 58, 59 (2d Cir. 1990) as the legal basis for dismissing the appeal as moot. While tax litigation is a very specialized form of law with its own precedent and rules/requirements which do not necessarily conform with other laws, this particular case is in direct conflict with the instant case, to wit:

> "Litigation of this case continued in the district court following oral argument of this appeal. On July 11, 1990, **jury verdicts were returned** in favor of the United States on the issue of the taxpayers' liability for penalties assessed against them by the IRS pursuant to 26 U.S.C. § 6700 (1988). Accordingly, the district court at that time orally vacated the

orders that are the subject of this appeal, and issued a written order to that effect on August 6, 1990.

[1] "A basic tenet of federal jurisdiction is that when a court is presented with issues that 'are no longer "live"' or when the parties 'lack a cognizable interest in the outcome,' the case is moot and therefore outside the court's jurisdictional authority." *R. C. Bigelow, Inc. v. Unilever N.V.*, 867 F2.d 102, 105 (2d Cir.1989) *cert.denied*, —U.S.—, 110 S.Ct. 64, 107 L.Ed.2d 31 (1989) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969)). Given the vacatur of the order from which this appeal was taken, we conclude that the appeal is moot, and therefore must be dismissed." **(Emphasis Mine)**

In the instant case, the judge also entered interlocutory judgments but the **monumental difference** is that "the taxpayers" got a jury trial while these "defendants" got an alleged, illegal "Settlement Agreement and Release", a dismissal with prejudice, subject, however to a reservation of jurisdiction by the district court, and vacatur rather than a Jury Trial.

G. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT SO FAR DEPARTED FROM THE BELOW QUOTED RELEVANT LAW THAT THE SUPERVISORY POWER OF THE SUPREME COURT IS NECESSARY.

Petitioner believes the decision of the Sixth Circuit has so far departed from the precedent set in the following cases as to require the supervisory power of the Supreme court:

Stroud v. Senese, 832 F.Supp. 1206, (N.D.Ill. 1993): "Determination whether union members would be required to exhaust internal union remedies prior to bring suit under Labor Management Reporting and Disclosure Act, was within discretion of court."

Appellant notes this case follows the history from *Finnegan v. Leu* and *Sheet Metal Workers' Int'l Ass'n v. Lynn* to conclude the elected union officers may not be summarily removed without the benefit of internal procedures which meets the standard of § 411(a)(5). From page 1212 of the case is the following:

> "After distinguishing *Finnegan*, the Court held that "Lynn's retaliatory removal states a cause of action under § 102", *Id.*, at 355, 109 St.Ct at 645, because "[t]he consequences of the removal of an elected official are much different" than the consequences of removing appointed officials. *Id.*, at 354, 109 S.Ct. at 644. When an elected union representative is removed from office in retaliation for exercising his § 101 rights, "the union members are denied the representative of their choice." *Id.* Disallowing a cause of action in such a case would undermine "the LMRDA's basic objective: **to ensure that unions are democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." (emphasis mine)**

§ 101 rights include the right to free speech (§ 411(a)(2)) and are far removed from what plaintiff actually seeks, i.e., privacy from speech *mis*representing a union member which, if known, might adversely effect his chance in elections.

Storment v. O'malley, 938 F.2d 86 (7th Cir. 1991) addressed a significant Public Interest when it stated "District Court's decision to abstain from interfering with state attorney disciplinary proceedings was not abuse of discretion; state proceedings were judicial in nature, state had important interest in maintaining professional conduct of licensed attorneys, attorney's claim that use of certain evidence would violate federal eavesdropping statute could be adequately resolved in state proceedings, and there was no showing of bad faith or harassment by state disciplinary commission or that state rules were

flagrantly and patently unconstitutional." In the instant case, the District Court, absent any showing there is a Title III violation, will not permit an internal disciplinary hearing which could result in censure, suspension, or removal from his elected office, but would not keep him from working in his original capacity. There should be no less Public Interest in ethical standards for Union Officers than there is for Officers of the Courts, and the Congress certainly indicated that in 29 § 401(a), (b), and (c).

Rafferty, et al. V. City of Youngtown, et al. No. 93-4193 (ELECTRONIC CITATION: 1995 FED App. 0154P (6th Cir.) File Name: 95a0154p.06) reinforces what petitioner has averred in E. herein above regarding the rights of an intervenor. Briefly stated, Rafferty, et al. were denied standing to sue because their union, the FOP (Fraternal Order of Police), was granted leave to intervene as a defendant-intervenor in the Williams case, which resulted in the 1986 Consent Decree and the June 1989 settlement agreement, which plaintiff's are challenging. The court correctly determined that the FOP was the authorized bargaining agent, that they did participate throughout the process resulting in settlement, and accomplished something for the majority of their members.

How does that square with what has happened in the instant case: UTU has not adequately represented their own defendants (UTU executive board), the Settlement Agreement and Release has denied Intervenor/Defendant Ruck his Seventh Amendment right (he does not lack standing to sue; **he is being sued**), and "Settlement" has benefitted no UTU member save one "misbehaving union officer"?

Smith v. Securities and Exchange Commission, No. 95-5862/6625 (ELECTRONIC CITATION: 1997 FED App.0332P (6th Cir.) File Name: 97a0332p.06) is a very interesting case for three obvious reasons: 1) It was issued exactly 21 days before Petitioner's case was dismissed as moot; 2) All three Judges who dismissed my

case, ruled on the En Banc decision in Smith; Boggs delivering the opinion of the court in which 7 judges agreed, and Merritt delivered a separate dissenting opinion, in which 5 judges agreed, including Nelson and Cole who agreed with Boggs on my dismissal; 3) the case involved complex issues dealing with the Federal Wiretap Act.

At first glance, one might conclude that even the courts are still divided over complex issues of the wiretap act. However, close scrutiny of footnote 6 indicates such was not the case as the dissent proposed the identical course of action as the court.

So even though Boggs, Nelson, and Cole disagreed on this particular case, it appears they knew exactly what they were doing pertaining to illegally intercepted evidence. After all, it was a wiretap per se pursuant to well settled law (*See Kratz*), i.e., third party interception of phone conversation. It is not like it was an oral conversation that would require a trier of fact!

It is interesting to note that Smith was tried in criminal proceedings, based upon evidence independently gathered, and found guilty of "insider trading". A far cry from this case wherein Earley can't be tried based upon independent evidence as result of the Court enforced "Settlement Agreement and Release".

I will admit, with all the hours of research and work I have done to attempt to adequately state my case and that of the Board members and all UTU members, I am way out of my league to address the four elements of collateral estoppel and the dissent addressing res judicata, mootness, and the legal history that has never heard of a doctrine that "collateral estoppel" or issue preclusion can simply make another case "moot". I do know that this case does not support the Dismissal as Moot and I leave it to the Honorable Justices to determine this issue. It is unknown if the Judge's can be excused for error account not having the Certified Record in view of the averments of Janice E. Yates (See App. "H", page 12 of 29). It does seem

strange that six (6) judges would modify the injunction to insure no use of an illegal interception when this petitioner consistently averred that he had no problem with an internal trial which prohibited the use of any illegally intercepted material as it was never necessary for the prosecution of my charges.

Vestal v. Hoffa, 451 F.2d 706, 709 (6th Cir 1971), cert, denied 406 U.S. 934 (1972), "One basic standard expressed by the Sixth Circuit was that "Courts are reluctant to substitute their judgment for that of union officials in the interpretation of the unions constitution, and will interfere only where the official's interpretation is not fair or reasonable." Of course, the irony here is that the district court bent over backwards to insure that the desire of the union president's interpretation, would preclude use of Article 25 of its Constitution to discipline a "misbehaving" union officer, under the guise that the evidence was "tainted" and in violation of the Federal Wiretap Act. This in the face of the fact there was no wiretap violation and his violations, assuming a Title III violation, were nevertheless verifiable by independent means. In the instant decisions herein sought to be overturned, the court has determined that the members must pay Earley his expenses and legal fees, pursuant to the Settlement Agreement and Release, without a jury trial, to sell out the member and the final and binding decision of the Board of Appeals. Such interpretation is not fair or reasonable and makes a mockery of the intent of the original 6th Circuit decision in *Vestal*.

Smiler v. Conner, 372 U.S. 221 and the associated companion cases; *Parsons v. Bedford*, 3 Pet. 433; *Scott v. Neely*, 140 U.S. 106; *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525; *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500; and *Dairy Queen, Inc. v. Wood* 369 U.S. 469 support this Petitioner's right to a jury trial both as a defendant and an intervenor!

CONCLUSION

Petitioner Lance E. Ruck, and all other defendants in this case, have been denied a jury trial by a court of competent jurisdiction to determine if there is any violation of the Federal Wiretap Act and to address their counterclaims against Earley's legal actions.

The district court had issued permanent injunction not based upon fact, reason, or law. It then vacated it without any trial on the merits and replaced it with an alleged "Settlement", over which the court retains jurisdiction with power to enforce, without the knowledge or consent of any of the defendants, including this intervenor. The Court of Appeals for the Sixth Circuit has condoned these action without ever even receiving the Certified Record.

Said decisions now have the effect of allowing a person in a representative capacity privacy from his employer and his client in order to violate federal labor laws. Such determination is not only contrary to the Congressional intent of Title III, it flies in the face of the very principals this democracy was founded on.

WHEREFORE, Petitioner Lance E. Ruck, Pro Se, respectfully prays that the Supreme Court grant his Petition for Writ of Certiorari; that the Court reverse the decisions of the federal courts below; and that the Court direct the remand of this cause for a trial on the merits.

Respectfully submitted,

Lance E. Ruck
Petitioner, Pro se
1525 Howze St.
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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ROBERT W. EARLEY	)	CASE NO. 1:94cv0597
	)	
PLAINTIFF	)	Consolidated with
v.	)	CASE NO. 1:94cv0674
	)	
EXECUTIVE BOARD OF THE UNITED TRASPORTATION UNION, et al.	)	JUDGE PETER C. ECONOMUS
	)	
DEFENDANTS	)	
and	)	MEMORANDUM OPINION
ROBERT W. EARLEY	)	
	)	
PLAINTIFF	)	
v.	)	
KENNETH R. SMOOT,et al.	)	
	)	
DEFENDANTS	)	

This matter is before the court on the request of Plaintiff, Robert W. Earley ("Earley") for a permanent injunction. Earley has alleged violations of the Federal Wiretap Act ("Act"), 18U.S.C.§ 2510 et seq,. as well as related state law claims. Earley seeks to prevent Defendants from commencing a trial of an intra-union charge against him for breach of duty based upon a tape recording which was made without his knowledge or permission. A hearing regarding the permanent injunction was held on May 31, 1996.

FACTS

Earley is a Vice President of the United Transportation Union ("UTU"). The UTU is an unincorporated labor organizatiion headquarted in Cleveland, Ohio. On May 6, 1993, Public Law Board No. 3882 ("PLB"), a private arbitration panel created pursuant to the Railway Labor Act, 45 U.S.C. § 153 convened to consider whether Defendant, Kenneth R. Smoot ("Smoot"), who is a member of the UTU, was entitled to a distribution of thirty shares of stock pursuant to a labor agreement between Smoot's employer, CSX Transportation, Inc. ("CSX"), and the UTU.

The PLB hearing was held on or about May 6, 1993, at the Baltimore, Maryland offices of CSX. The members of the PLB who were present at the meeting were Earley as the UTU representative for Smoot, Howard Emerick as the Senior Director of CSX and H. Raymond Cluster, the Chair and neutral member. Smoot brought two tape recorders to the meeting. At some time during the meeting, Smoot turned on the recorders. Before the beginning of an executive session of the meeting, Smoot was asked to leave. He left but did not turn the recorders off. None of the parties to the executive session were aware that the meeting was being recorded.

On July 15, 1993, a decision was reached by the PLB

denying Smoot's claim for distribution of the CSX shares. This decision was formalized on August 30, 1993, when the PLB issued an "award" denying Smoot's claim.

In October 1993, the recordings of the executive session were transcribed by Brightwell Reporting Service. The UTU alleges that Earley was trying to convince the neutral that Smoot's claim should be denied. Earley maintains that his position on the Smoot claim was based upon his understanding of the requirements for the distribution of stock under the labor agreement.

By letter dated December 15, 1993, Smoot wrote Defendant, K. N. Thompson, Chair of the UTU's Executive Board, presenting formal charges against Earley. The Executive Board is a union board established under the UTU International Constitution and is authorized, under the constitution, to investigate and adjudicate charges against UTU officers. Smoot's letter charged Earley with breach of a duty of good faith and fair dealing as a Union representative at the PLB hearing. The letter included an attached transcript of the recording of the hearing. On January 19, 1994, Earley was notified by the Executive Board that it would proceed with the charges brought against him by Smoot. A disciplinary hearing was set for March 13, 1994.

On March 14, 1994, Earley filed an action against Smoot in the United States District Court for the District of Maryland requesting declaratory and injunctive relief. On March 16, 1994, Plaintiff moved for a temporary restraining order to prohibit Smoot from using or disclosing the substance of the tapes made during PLB hearing at a trial before the Executive Board. On March 22, 1994, the Honorable Judge Frederic N. Smalkin of the United States District Court for the District of Maryland issed a preliminary injunction which enjoined Smoot from participating in the UTU disciplinary proceedings against Earley to the extent that they involved allegations that Earley acted improperly in connection with the PLB proceedings. (Order Granting Prelim. Inj. At 1). Smoot was further ordered to refrain from using the tape or transcript except in connection with his defense in this action. (Order Granting Prelim. Inj. At 2). Judge Smalkin then transferred the action to United States District Court for the Northern District of Ohio where it was assigned Case No. 1:94cv674.

On March 28, 1994, Defendant Lance E. Ruck ("Ruck"), a member of the UTU, filed charge with the Executive Board against Earley after he read a copy of the transcript of the PLB hearing. In that charge, Ruck alleged that Earley argued against the official position of the UTU in the

Smoot hearing. He also alleged that Earley therefore failed to perform his duties as required under the UTU constitution. Ruck admitted during a preliminary injunction hearing that he listened to a copy of the tape made by Smoot several times and that his claims against Earley were for the same wrongdoing as those alleged by Smoot. In effect, Ruck attempted to continue the disciplinary hearing that Smoot had been enjoined from continuing. Earley amended his Complaint in Case No. 1:94cv674 and named Ruck as a defendant.

Earley also filed a another action in the United States Distric Court for the Northern District of Ohio naming as defendants, the UTU Executive Board and the individual members of the Board. That action was filed on May 22, 1994, and was docketed as Case No. 1:94cv597. In that case, Earley sought to enjoin the UTU Executive Board members from holding a trial on the charges of Ruck and Smoot. Earley alleged that the Executive Board members had read the entire transcript of Smoot's tape and, therefore, could not objectively adjudicate the charges against him. Earley further asserted that the Executive Board's use of the transcript violated the Act. Because of the commonality of facts and issues, the two cases, Case No. 1:94CV597 and Case No.1:94CV674, were consolidated on May 18, 1994.

On March 16, 1995, United States District Judge Solomon Oliver, Jr. granted Earley's motion for a preliminary injunction which precluded the UTU from commencing a trial on the intra-union charges against Earley.

LAW

Earley is seeking a permanent injunction which would prohibit the use or disclosure of the contents of the recordings of the executive session of the PLB. A hearing was held before this Court on May 31, 1996, during which testimony and evidence were presented. In addition, the parties have submitted the transcript of the preliminary injunction hearing that was held before Judge Oliver for the Court's consideration.

The Court examines the following factors when determining the propriety of a permanent injunction:

1. The plaintiff has prevailed on the merits of its claims;
2. The plaintiff will suffer irreparable injury if the permanent injunction is not issued; and
3. The balance of the equities weighs in favor of the entry of the permanent injunction.

National Interstate Insurance Company v. Perro, 934 F.Supp 883, 889 (N.D.Ohio 1996).

1. The Merits of Earley's Claims

Title 18, U.S.C. § 2511 provides civil and criminal penalties for the intentional use and/or disclosure of information obtained in violation of the Federal Wiretap Act. Section 2511

provides, in pertinent part:

> (1) Except as otherwise specifically provided in this chapter and person who —
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other devices to intercept any oral communication when —
>
> (i) such device is affixed to, or otherwise Transmits a signal through, a cire, cable, or other like connection used in wire communications; or
>
> (ii) such device transmits communications by radio, or interferes with the transmission of such communications; or
>
> (iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate of foreign commerce; or
>
> (iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business of any business or other commercial

establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic Communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents af any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(A)(ii), 2511(b)-(c), 2511(e), 2516. And 2518 of this subchapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investgation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation.

18 U.S.C. §2520(b) provides that appropriate relief for a violation of the Act includes "such preliminary and other

equitable or declaratory relief as may be appropriate . . . ."

Based upon the evidence presented, the Court finds that Defendants have violated §2511 by tape recording the executive session of the PLB and by the use and disclosure of the contents of said tape. Smoot intentionally recorded the meeting without the knowledge and consent of any of the parties to the meeting. Smoot, Ruck, and the Executive Board of the UTU have disclosed the contents of the recording on numerous occasions with the knowldege of how the recording was made.

2. Irreparable Injury

If the Court denies Earley's request for a permanent injunction, the UTU would proceed with Smoot's and Ruck's charges against him and use the tape recordings against him. The Sixth Circuit has held that each time an illicitly obtained recording is replayed to a new and different listener, the scope of the invasion of privacy of an aggrieved party is widened. Fultz v. Gilliam, 942 F.2d 396, 402 (6th Cir.1991). "it seems beyond doubt that the release of unlawfully obtained wiretap material to any third part . . . is clearly banned by the Act." Id.

Additionally, the full and fair hearing to which a union member is entitled before being expelled is at a minimum a hearing by an unbiased and disinterested tribunal. Mayle v. Laborer's Int'l Union 1015, 866 F.2d 144, 146 (6th Cir. 1988)

citing Myers Affiliated Property Craftmen, 667 F.2d 817, 820 (9th Cir. 1982) citing Falcone v. Dantinne, 420 F.2d 1157, 1166 (3rd Cir. 1969). Bias exists where the hearing tribunal is hostile to the member, has prejudged the member's guilt, or has considered matters not presented at the hearing. Myers, 667 F.2d 820.

There is evidence of bias by members of the Executive Board who would conduct the trial of the claims against Earley. Testimony indicated that in January of 1993, five members of the Executive Board met in St. Louis for eight hours. During that time, they reviewed materials concerning the Earley matter, including the transcript of the Smoot tape. Based on the materials which they reviewed the Executive Board members determined that a trial should be convened.

In view of the Act's prohibition against the use of any unlawfully obtained wiretap material, the testimony and evidence presented to this court at the permanent injunction hearing, and Earley's right to privacy and a fair hearing, the Court finds that Earley will suffer irreparable injury if the Court does not grant his request for a permanent injunction.

3. Balancing the Equities

While Defendants have an interest in a full hearing on whether Earley, a UTU officer, breached his duties, the decision

should not be based upon evidence which was imporperly, if not illegally obtained. As discussed above, Earley has the right to a fair and impartial hearing and the right to privacy. The Court finds that the balance of the equities weighs in favor of the entry of the permanent injunction.

CONCLUSION

For the reasons set forth above, the Court shall enter a permanent injunction against Defendants which shall prohibit the disclosure and use of the tape of the tape recordings of the PLB executive session which was held May 6, 1993. An appropriate Order shall accompany this Memorandum Opinion.

IT IS SO ORDERED

Original Signed
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ROBERT W. EARLEY	)	CASE NO. 1:94cv0597
	)	
PLAINTIFF	)	Consolidated with
v.	)	CASE NO. 1:94cv0674
	)	
EXECUTIVE BOARD OF THE UNITED TRASPORTATION UNION, et al.	)	JUDGE PETER C. ECONOMUS
	)	
DEFENDANTS	)	
and	)	**ORDER**
ROBERT W. EARLEY	)	
	)	
PLAINTIFF	)	
v.	)	
KENNETH R. SMOOT,et al.	)	
	)	
DEFENDANTS	)	

In accordance with the Memorandum Opinion filed this day, Plaintiff's request for a permanent injunction is **GRANTED** as follows:

1.Defendants, their officers, agents, servants, employees and attorneys are permanently enjoined from using or disclosing for any purpose whatsoever any tape recording, transcript of any tape recordings or any evidence derived from the executive session of the Public Law Board 3882 on May 6, 1993;

2. Defendants, their officers, agents, servants, employees and attorneys are permanently enjoined from convening and proceeding to trial upon the charges lidged with the Executive Board by Defendant, Kenneth R. Smoot and Lance E. Ruck relating to or in any manner connected with the proceedings held before the Public Law Board 3882 on May 6, 1993; and

3.Defendants, their officers, agents, servants, employees and attorneys are permanently enjoined from using, communicating and disclosing, either orally or in writing, to anyone the contents of the tape recording and /or transcript of the executive session of the Public Law Board 3882 held on May 6, 1993.

IT IS SO ORDERED.

Original Signed
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT W. EARLEY	)	CASE NO. 1:94cv0597
	)	
Plaintiff,	)	JUDGE PETER C.
	)	ECONOMUS
-vs-	)	
	)	
EXECUTIVE BOARD OF	)	JUDGMENT
THE UNITED TRASPOR-	)	
TATION UNION, et al.	)	
	)	
Defendants,	)	

This cause came on for hearing this 31st day of January, 1997, upon the motion of the plaintiff for an order of voluntary dismissal of the within action, conditioned on the Court's reserving jurisdiction to give effect to or to enforce the Settlement Agreement entered into by the plaintiff and defendants.

WHEREUPON, this Court finds that the plaintiff and defendants have entered into a Settlement Agreement, which agreement provides, inter alia , that the plaintiff shall move for dismissal of this action with prejudice, subject, however, to a reservation of jurisdiction by this Court.

The Court further finds that defendatnts herein, by an

through their counsel, have notified the Court in a writing filed with the Court that defendants consent to the allowance of plaintiff's motion. Intervenor Lance E. Ruck is not a party to the Settlement Agreement.

The Court finally finds that plaitiff's motion is well-taken and, in the interest of justice, should be granted.

IT IS, THEREFORE, ORDERED that this action be, and is hereby dismissed with prejudice at plaintiff's costs.

IT IS FURTHER ORDERED that the permanent injunction entered herein on October 29, 1996, be, and it is hereby, vacated as to these defendants only.

IT IS, FINALLY, ORDERED that the Court shall retain jurisdiction over the persons of the plaintiff and defendants, and over the subject matter of the action and the Settlement Agreement entered into by plaintiff and defendants, for the purpose of entering any order, if moverd bya party to do so, and after notice and hearing, which the Court shall determine is necessary to give effect to or to otherwise enforce the Settlement Agreement between plaintiff and defendants, including, without limitation, the entry of a restraining order, and other injunctive relief, termporary and permanent.

Original Signed
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT W. EARLEY	)	CASE NO. 1:94cv0674
	)	
Plaintiff,	)	JUDGE PETER C.
	)	ECONOMUS
-vs-	)	
	)	
EXECUTIVE BOARD OF	)	**ORDER**
THE UNITED TRASPOR-	)	
TATION UNION, et al.	)	
	)	
Defendants,	)	

This cause came on to be heard this 5th day of February, 1997, upon the motion of the plaintiff for an order dismissing the within action without prejudice to plaintiff's right to refile the action.

WHEREUPON, the Court finds that the motion should be granted.

IT IS, THEREFORE, ORDERED, that the within action be, and it is hereby, dismissed without prejudice to plaintiff's right, should he so elect, to refile this action in accordance with law.

IT IS FURTHER ORDERED, that the permanent injunction entered herein by the Court on October 29, 1996, be,

and it is hereby, vacated, set aside and held for naught.

IT IS FINALLY ORDERED that the Clerk of Court pay to plaintiff the One Thousand Dollars ($1,000.00) previously deposited by plaintiff with the Clerk of the United States District Court for the District of Maryland in case no. 594-622 as bond pursuant to the order of Judge Smalkin, which funds were thereafter transferred to this Court pursuant to the transfer order and are presently in the possession of the Clerk of the Court.

Original Signed
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT W. EARLEY	)	
	)	
Plaintiff - Appellee,	)	
v.	)	
	)	
UNITED TRASPORTATION	)	
UNION, Executive Board, et al.,	)	**ORDER**
	)	
Defendants,	)	
	)	
LANCE E. RUCK	)	
	)	
Intervenor/Defendant-Appellant.	)	

Before: **NELSON, BOGGS, AND COLE,** Circuit Judges.

This matter is before the court upon consideration of the motion of Rober W. Earley to reconsider the portion of the September 24, 1997 order denying the motion to dismiss and the motion of Lance E. Ruck to reconsider the portion of the September 24 order denying a motion to stay the decision of the district court.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it denied the motion to stay the decsion of the district court. Fed. R. App. P. 40(a).

However, after consideration of Earley's motion to

reconsider, the panel concludes that the appeal is moot and should be dismissed. Earley filed two cases in the district court; Ruck was a defendant in one and an intervenor in the other. An injunction was entered in both cases. The district court's decision in the case in which Ruck was an intervenor specifically excluded him from the portion of the order that vacated the injunction. However, at a later date, the district court vacated the injunction, thereby mooting the appeal. *Barrister Assocs. v. United States (In re Tax Refund Litig.)*, 915 F.2d 58, 59 (2d Cir. 1990).

It is order that Ruck's motion for reconsideration is denied, Earley's motion for reconsideration is granted, and the appeal is dismissed as moot.

ENTERED BY ORDER OF THE COURT

Signature of Leonard Green
Clerk